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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

N.K. BEVERLY HILLS CORPORATION, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, Defendant and Respondent.	B236107 (Los Angeles County Super. Ct. No. BC424220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Horvitz & Levy, Peder K. Batalden, John A. Taylor, Jr.; Geragos Law Group, Matthew J. Geragos; N.K. Beverly Hills Corporation and Mori Nasri for Plaintiff and Appellant.

Musick, Peeler & Garrett, Barry D. Hovis and Walter J.R. Traver for Defendant and Respondent.

In this action for breach of contract, plaintiff and appellant N.K. Beverly Hills Corporation (N.K.) appeals[1] from a judgment following the granting of a motion for summary judgment in favor of defendant and respondent JPMorgan Chase Bank (Chase Bank).[2] N.K. contends triable issues of fact exist that preclude the grant of summary judgment. We affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

I. First Amended Complaint

N.K. filed a complaint against Chase Bank and other defendants in October 2009 for breach of contract, promissory estoppel, negligent interference with contractual relations, and declaratory relief. As amended in January 2010, the complaint alleged as follows. On September 25, 2008, N.K. obtained a $29 million loan from Washington Mutual Bank (WAMU) to refinance a commercial property. The loan was secured by a deed of trust[3] and promissory note. The deed of trust provided: "LENDER MAY AT ANY TIME SELL, ASSIGN, PARTICIPATE OR SECURITIZE ALL OR ANY PORTION OF LENDER'S RIGHT'S [*sic*] AND OBLIGATIONS UNDER THE LOAN DOCUMENTS. IN THE EVENT LENDER AT ANY TIME (AND FROM TIME TO TIME) DURING THE TERM OF THE NOTE, DECIDES TO SELL OR OTHERWISE ASSIGN THIS NOTE TO A THIRD PARTY FOR CONSIDERATION TO BE

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1 The notice of appeal, which was filed after the judgment was rendered but before entry of the judgment, is treated as timely filed immediately after entry of the judgment. (Cal. Rules of Court, rule 8.104(d)(1).)

2 Summary judgment was also granted in favor of a second defendant, California Reconveyance Company. N.K. does not appeal from the judgment in favor of California Reconveyance Company.

3 A copy of the deed of trust was annexed to the first amended complaint.

RECEIVED BY LENDER, LENDER SHALL USE ITS BEST EFFORTS TO NOTIFY BORROWER IN WRITING OF ITS INTENT TO SELL OR ASSIGN THE NOTE AND OFFER BORROWER A RIGHT OF FIRST REFUSAL, FOR A PERIOD (THE "OFFER PERIOD") COMMENCING UPON RECEIPT OF SUCH NOTICE BY BORROWER AND ENDING FOURTEEN DAYS THEREAFTER TO PURCHASE THE NOTE FOR THE LESSER OF (A) ALL AMOUNTS DUE TO LENDER OR ANY SUBSEQUENT OWNER, . . . OR (B) THE ACTUAL CONSIDERATION TO BE PAID BY THE BUYER OF THE NOTE (THE "OFFER"). . . . NOTWITHSTANDING THE FOREGOING, IN NO EVENT, HOWEVER, WILL LENDER'S FAILURE TO SO NOTIFY BORROWER OF THE OFFER PRIOR TO SELLING THE NOTE CONSTITUTE A DEFAULT BY LENDER."[4] In March 2009, Chase Bank gave notice to N.K. that it had acquired the deed of trust and note. N.K. made monthly payments to WAMU until it received notice future payments were to be made to Chase Bank.

In the cause of action for breach of contract, N.K. alleged Chase Bank, as the successor in interest to WAMU, breached the right of first refusal provision by making no effort to notify N.K. of the sale, assignment, or transfer of interest. N.K. is ready, willing, and able to purchase the interest in the loan under the same terms as Chase Bank's purchase. In the cause of action for promissory estoppel, N.K. alleged on or before September 25, 2008, WAMU promised N.K. to enter into a loan and N.K. would be granted the right of first refusal in the sale, transfer, or assignment of WAMU's rights in the note. N.K. was induced by the promise and relied on it. In the cause of action for negligent interference with contractual relations, N.K. alleged Chase Bank knew or should have known of N.K.'s right of first refusal. Chase Bank negligently interfered with that right by purchasing the note from WAMU. N.K. sought a declaration that it had

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[4] The Deed of Trust, Security Agreement, Assignment of Leases and Rents, and Fixture Filing ("deed of trust") was annexed to the first amended complaint. The deed of trust indicates it was signed by N.K. on September 26, 2008. The record does not contain WAMU's signature page.

a valid right of first refusal entitling it to have WAMU use its best efforts to notify N.K. of any sale of the loan, which right was breached when no effort to notify N.K. was made.

II. Chase Bank's Answer to First Amended Complaint

Chase Bank alleged as one of its affirmative defenses that the first amended complaint fails to state facts sufficient to constitute a cause of action.

III. Chase Bank's Summary Judgment Motion

Chase Bank filed a motion for summary judgment on March 24, 2011, on the ground there was no triable issue of material fact. Chase Bank contended it was impossible for WAMU to give notice because WAMU ceased to exist as of September 25, 2008, when it was seized by the Office of Thrift Supervision, which appointed the Federal Deposit Insurance Company (FDIC) as receiver. Chase Bank contended the note was not sold or assigned, because Chase Bank acquired WAMU's loans and loan commitments on September 25, 2008, from FDIC before the loan was consummated. Further, the right of first refusal provision provides that failure to give notice is not actionable.

A. *Affidavit of FDIC*

On September 25, 2008, WAMU was closed by the Office of Thrift Supervision, and FDIC was named receiver. Pursuant to federal law, FDIC had authority to transfer any asset of WAMU without approval or consent. Pursuant to the Purchase and Assumption Agreement between FDIC as receiver of WAMU and Chase Bank dated September 25, 2008, Chase Bank acquired all loans and loan commitments of WAMU.

"As a result, on September 25, 2008, [Chase Bank] became the owner of the loans and loan commitments of Washington Mutual by operation of law."

B. *Office of Thrift Supervision Order dated September 25, 2008*

On September 25, 2008, the Office of Thrift Supervision found WAMU was insolvent and appointed FDIC as receiver for the purpose of liquidation.

C. *Purchase and Assumption Agreement Made September 25, 2008*

At the close of business on September 25, 2008, the Office of Thrift Supervision closed WAMU and appointed FDIC receiver. On September 25, 2008, Chase Bank and FDIC entered into a purchase and assumption agreement, under which FDIC conveyed to Chase Bank all of the assets WAMU owned as of the close of business on September 25, 2008, and FDIC retained all liability for claims alleged to have arisen from WAMU's pre-closing conduct.

D. *Declaration of Ed Padilla*

The deed of trust was executed by N.K. on September 26, 2008, and the loan was funded on September 29, 2008. On September 26, 2008, after FDIC's takeover of WAMU and Chase Bank's acquisition of WAMU's assets was announced publicly, N.K. inquired whether Chase Bank would make the loan.

IV. N.K.'s Opposition to the Motion for Summary Judgment

N.K. contended there was a triable issue of material fact as to whether WAMU made the loan and when it was made. N.K. presented evidence the loan was made by WAMU on September 25, 2008, prior to Chase Bank's acquisition of the loan, because

the deed of trust and note state they were made on September 25, 2008. To support the contention that WAMU made the loan on September 25, 2008, N.K. submitted evidence of the loan negotiations, application, rate lock, and loan approval.

A. *Promissory Note*

The note, dated September 25, 2008, contained the same right of first refusal provision that was contained in the deed of trust.

B. *Trial Court's Ruling*

At a hearing on June 7, 2011, the trial court ruled there was no violation of the note, "because what happened here was not a failure to notify the borrower of any sort of offer prior to selling the note. It was a takeover of an insolvent bank by the FDIC under the United States Code. [¶] And I just don't think that that is the condition that was intended by the parties in the contract. I just don't think it's there to require that notice. [¶] There's a secondary issue about the timing here with regard to all of this happening right on or about September 25th, and we could get caught up in that argument, but I think the case stands on the notion that it wasn't a sale or a transfer that was within the intention of the parties of a commercial event. This was a governmental event in the takeover of the bank." "There has not been a sale or transfer within the meaning of the terms of the contract simply as a matter of law. There are no material issues of fact to try because there wasn't a sale or transfer. It was a bank takeover."

On July 28, 2011, the trial court issued a written order granting summary judgment for the reason, among others, that the note was not sold, assigned, or transferred by WAMU. The other reasons were that the deed of trust provides that WAMU's failure to notify N.K. of the offer prior to selling the note shall not constitute a default by WAMU; and California Reconveyance Company was not the lender and thus had no duty

under the right of first refusal provision to notify N.K. of an intent to sell the note. Judgment was entered in favor of Chase Bank and against N.K. on October 28, 2011.

DISCUSSION

N.K. contends the trial court erred in granting summary judgment on the theory there was no sale of the loan by WAMU and thus no breach of the right of first refusal. N.K. contends there is a triable issue whether the loan was made by WAMU or Chase Bank. We conclude summary judgment was proper. There is no triable issue whether WAMU sold the loan to Chase Bank. The evidence is uncontroverted that (1) the right of first refusal in the deed of trust applied only to a sale of the loan by WAMU and (2) Chase Bank acquired the loan from FDIC. Accordingly, there is no triable issue whether Chase Bank's acquisition of the loan violated the right of first refusal.

Standard of Review of Orders Granting Summary Judgment

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.) "[W]e '"liberally construe the evidence in support of the party opposing

summary judgment and resolve doubts concerning the evidence in favor of that party."' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

FDIC As Receiver Is Authorized to Transfer Assets

Title 12 of the United States Code, section 1821(d) provides in pertinent part: "(2) (E) . . . The Corporation[5] may . . . , as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution . . . . [¶] . . . [¶] [(G)] (i) . . . The Corporation may, as . . . receiver-- **[¶]** . . . [¶] [(II)] . . . transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer."

There is No Triable Issue Whether There was a Sale or Transfer by WAMU to Chase Bank Under the Right of First Refusal Provision

For there to be a breach of N.K.'s right of first refusal under the deed of trust, there must be a sale or assignment of the note to a third party by WAMU. N.K. presented no evidence of such sale. It is undisputed in the record that the Office of Thrift Supervision closed WAMU and appointed FDIC receiver of WAMU, and Chase Bank acquired from FDIC all of WAMU's assets owned at the close of business on September 25, 2008. If WAMU did not make the N.K. loan prior to being closed, WAMU had no note to sell. If WAMU did make the loan, the loan was seized by FDIC

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5 The "Corporation" is the FDIC.

and sold to Chase Bank under the September 25, 2008 Purchase and Assumption Agreement between FDIC and Chase Bank.

The trial court properly ruled the undisputed evidence established that Chase Bank acquired the loan in a manner that did not trigger the right of first refusal. Summary judgment was therefore properly entered.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Chase Bank.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.